TABLE OF CONTENTS

LIST OF AUTHORITIES CITED

NLRB v. *Ross Gear & Tool Co.*, 158 F. 2d 607 (7 Cir. 1947)

Dobbs Houses, Inc., 145 NLRB 1565 (1964)

Elec. Motors & Specialties, Inc., 149 NLRB 1432 (1964)

Texaco, Inc., Houston Producing Division, 168 NLRB 361 (1967)

Texaco, Inc., Houston Producing Division v. *NLRB*, 408 F. 2d 142 (5 Cir. 1969)

Chevrol Oil Company, 168 NLRB 574 (1967)

Jacobe-Pearson Ford, 172 NLRB No. 84 (1968)

Wald Manufacturing Company, 176 NLRB No. 119 (1969)

Dayton Typographic Service, Inc., 176 NLRB No. 48 (1969)

Texaco, Inc., Los Angeles Sales Terminal, 179 NLRB 976 (1969)

Illinois Bell Telephone Company, 192 NLRB No. 138

Quality Manufacturing, 195 NLRB No. 42

Fibreboard Paper Products Corp. v. *NLRB*, 379 U.S. 203 (1964)

NLRB v. *Kearney & Trecker Corp*, 237 F. 2d 416, 419 (7 Cir. 1956)

NLRB v. *Auto Industries, Inc.*, 313 F. 2d 858, 863 (7 Cir. 1963)

Mobil Oil Corporation, 196 NLRB No. 144

Western Electric Company, 198 NLRB No. 82

United Airlines, Inc., 28 LA 179 (1956)

E. I. DuPont de Nemours & Co., 29 LA 646 (1957)

Erwin Mills, Inc., 43 LA 31 (1963)

Mobil Oil Corp., 196 NLRB 1052, enforcement denied, 483 F. 2d 842 (C.A. 7)

J. Weingarten, Inc., 202 NLRB 69, enforcement denied, 485 F. 2d 1135 (C.A. 5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-765

THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO,

Petitioner,

v.

QUALITY MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF OF QUALITY MANUFACTURING COMPANY

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 58a-71a) is reported at 481 F.2d 1018. The decision and order of the Board (Pet. App. 1a-58a) are reported at 195 NLRB 197.

JURISDICTION

The judgment of the court of appeals (Pet. App. 72a) was entered on July 19, 1973. On October 5, 1973, the Chief Justice extended the time for filing a

petition for a writ of certiorari to December 17, 1973. The petition was filed on November 12, 1973, and was granted on April 29, 1974 (A. 200), The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pp. 2-3 of the petition.

QUESTIONS PRESENTED

I. Whether Quality violated Section 8(a)(1) of the Act by denying the request of an employee for representation at an investigative interview before Quality was committed to discipline and before any grievance had been filed.

II. Whether the Board, in deciding this case on a novel theory of law which contravened twenty-five years of decisional law, has fulfilled its required obligation to explicate its legal and factual rationale so as to demonstate that such decision is within the discretion vested in it by the Congress.

III. Whether the Board's factual findings herein are selective, arbitrary and dependent upon non-objective evidenve to the extent that its decision is not supported by substantial evidence.

IV. Whether the Board's Decision is based on a finding neither alleged in its complaint nor litigated at its hearing and thus derogates from elemental concepts of due process.

V. Whether the Board, in requiring union or other representation at an investigatory interview in a plant covered by a bargaining agreement containing detailed grievance and arbitration procedures of broad scope, has wrongfully invaded dispute settling methods which Congress intended to be worked out by the parties to a bargaining agreement; and has wrongfully attempted to dictate the terms of such an agreement.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case is before the Court upon a petition of the Union to reverse the decision of the Court of Appeals reported at 481 F. 2d 1018.

Based on an unfair labor practice charge filed by the International Ladies' Garment Workers' Union, Upper South Department, AFL-CIO, the Board issued a complaint against Quality. The complaint alleged that Quality violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. §158(a)(1), (3) and (5) (hereinafter called the "Act") by refusing to allow an employee to be represented by the charging party at a meeting, and thereafter discharging said employee and two alleged representatives.

On January 28, 1972, a majority of a Board panel composed of Messrs. Miller, Fanning, Jenkins and Kennedy decided that Quality's denial of representation and termination of the three employees constituted a violation of Section 8 (a)(1) of the Act.

Member Kennedy dissented and would dismiss the complaint in part.

On July 19, 1973, the Court of Appeals reversed the Board in part and denied enforcement holding that as to such part Quality did not violate the Act. 481 F. 2d 1018.

FACTS

Respondent is a manufacturer of women's clothing and operates a plant at Point Pleasant, West Virginia, with approximately sixty production employees. The production employees are members of Upper South Department, of The International Ladies Garment Workers Union, AFL-CIO.

At all material times there was in existence a collective bargaining agreement negotiated between the Union and the Respondent, this is charging party Exhibit No. 1.

Article XXII of the agreement provides that the only people having power to act as an agent of the Union are the Manager of the Union or the designated business agent servicing the shop.

Article XXIII contains an elaborate grievance and arbitration procedure. Section 2 of the procedure provides that the procedure is the "exclusive means for the termination of all disputes, complaints, controversies, claims or grievances whatsoever, including claims based upon any breach of this agreement. It is intended that this provision shall be interpreted as broadly and inclusively as possible. Neither party shall institute any action or proceeding in a court of

law or equity, state or federal, other than to compel arbitration, as provided in this agreement, or to enforce the award of an arbitrator. This proceeding shall be a complete defense to any action of proceeding instituted contrary to this agreement."

The collective bargaining agreement does not provide for any right on the part of an employee to demand Union representation other than through the formal grievance procedure. There is no contention by any party that a grievance procedure was utilized by any party in connection with the events out of which this proceeding arises, except that at a later date grievances were filed over the alleged suspension and discharge of the three involved employees.

Catherine King was a production employee, a sewing machine operator, and she had made it a practice to visit the office of the President of the company daily and sometimes he (Mr. Gerlach) called her to his office as well.

The Respondent had a policy of requiring employees to obtain permission before leaving their work station. Alice Hoschar, President of the Union's local always obtained permission to leave the floor to discuss Union matters with management. (Trial Examiners Decision). Joel Goolst, business agent for the Union, testified that employees Mulford and Cochran were discharged because they came off the floor without permission. (Trial Examiners Decision). Mary Kathryn Gerlach, Respondent's Production Manager, testified with respect to the company rule that employees could not leave the work floor during working hours without first obtaining

permission. (Trial Examiners Decision). Lawrence Gerlach, Jr., General Manager of Respondent, testified to the rule that "nobody leaves the stitching room floor without permission." (Trial Examiners Decision). Larry Stephens, Respondent's secretary testified that Respondent had a rule that employees had to have permission to leave the sewing room floor during working hours, and that it had been enforced for a considerable period of time before 1969. (Trial Examiners Decision).

Incredibly, in the face of this uncontradicted evidence submitted by the General Counsel as well as the Respondent, the Trial Examiner made a finding of fact that the Respondent had no rule against leaving a work station without permission. (Trial Examiners Decision). It is readily apparent from the remarks of the Trial Examiner that he is confusing the question of the existence of the rule, with the contractual right of the Respondent to maintain such a rule and the legal right under the Act of the Respondent to have such a rule. It is undisputed from the evidence that the Union knew of the existence of the rule over many years and had never objected to it. There is nothing in the contract nor in the Act which forbids such a rule.

On October 10, 1969, Catherine King shut down her sewing machine and was causing a disturbance to the extent that two other employees had ceased their work. A supervisor directed King to resume her work, and King replied, "you tend to your business." The supervisor said, "Well, now we'll just go down and talk to Mr. Gerlach (President of the Respondent) about it."

Dolores Mulford was requested by King to accompany her. Mulford was a Chair Lady (steward), but she had no authority to serve as a Union representative except under the grievance procedure, which procedure was not involved. At Gerlach's office Mulford was directed to return to her work station because there was no grievance pending. Gerlach requested King to come into his office for a conference and she refused to go without Mulford. Mulford was suspended for two days for leaving her work station without permission.

Beginning on Monday, October 13, through Thursday, October 16, there were various conversations between King, Mulford, Martha Cochran, an Assistant Chair Lady who was also requested by King to represent her, and the President and Production Superintendent of the Respondent, Mr. and Mrs. Gerlach. Quality insisted on a conference with King alone, and King insisted that she be accompanied by Mulford or Cochran at any such conference. At the end of the discussions over this period of time, King, Mulford and Cochran had ceased to work with Quality contending that they had quit their jobs and the General Counsel contending that they had been discharged.

SUMMARY OF ARGUMENT

The Board's finding that Section 8(a)(1) of the Act was violated by Quality's denial of Union representation to an employee at a lawfully motivated investigatory interview prior to a decision to discipline and prior to a grievance being filed is contrary to law. And when, as here, the Board predicates such decision on a novel theory of law which sweeps aside

twenty-five years of case law, its failure to disclose and explicate its legal and factual rationale therefor is additionally and fatally deficient. Further, the Board's selective and arbitrary consideration of the facts and its reliance upon subjective "state of mind" evidence leaves the Board's decision unsupported by substantial evidence. Additionally, the Board's decision herein; resting as it does on whether an employee has reasonable grounds to fear that discipline might result from the investigatory interview; turns upon an issue neither alleged in its complaint nor litigated at its hearing and, thus, is in complete derogation of elemental concepts of due process. And finally, the Board, in superimposing its rigid requirement of Union representation over a bargaining agreement containing detailed grievance and arbitration procedures of broad scope has wrongfully invaded dispute settling procedures which Congress intended to be worked out by parties to collective bargaining agreements, and has unlawfully attempted to dictate the terms of such an agreement.

ARGUMENT

A. THE BOARD'S DECISION HEREIN IS IN DEROGATION OF THE DECISIONS OF THE UNITED STATES COURTS OF APPEAL INCLUDING THIS COURT: REPRESENTS AN UNWARRANTED AND EX POST FACTO DEPARTURE FROM ITS OWN DECISIONS: AND IS LEGALLY DEFICIENT IN SUPPORTING RATIONALE.

(1) *Over twenty-five years ago, this Court held that there is no right to have a union representative*

present at meetings to investigate employee misconduct before any grievance has arisen or been filed. In *NLRB* v. *Ross Gear & Tool Co.,* 158 F. 2d 607 (7 Cir. 1947), a female employee named Ford had engaged in a serious dispute with other employees. When several employees threatened to resign unless Ford was discharged, she was summoned to a supervisor's office to discuss the controversy. After Ford twice refused to attend unless accompanied by union representatives; she was discharged for insubordination. The Court rejected a Board determination that the discharge violated Section 8(a)(1) of the Act, commenting (158 F. 2d at P. 613):

> "The Board in its brief states: 'As the Board has pointed out the legality of Ford's dismissal turns upon the issue whether or not she was within her statutory rights in insisting upon the presence of the Union committee when Strecker ordered her to report to his office alone.' A decision of this issue favorable to the Board would mean that any employee could with impunity refuse to comply with a direction by management and in effect abrogate a rule such as the one here involved. Assuming that an employee has a right to be represented by the union in the discussion or presentation of a labor grievance with an employer, such a right does not exist in the instant case. This is so, in our view of the matter, because there is no basis for the contention that such a grievance was involved . . . "

The Court concluded that Ford's discharge "was for a lawful and valid reason" 158 F. 2d at p. 614. In the instant case, as in *Ross Gear,* the employee requested Union representation at an investigatory meeting; at a time before discipline was imposed or

even probable; and, of course, at a time before any grievance had arisen or was filed. From the time of *Ross Gear* to the present there has been no amendment to any relevant statutory privisions of the Act. Accordingly, the holding of *Ross Gear* remains valid, and governs this case.

(2) *From* 1947 *to* 1963, *the Board's General Counsel deferred to Ross Gear.* From 1947, the year of the *Ross Gear* decision, to 1963 there was no reported Board decisions involving union representation at pre-grievance meetings of the sort here involved. However, on four occasions, as reported in Administrative Opinions of the Board's General Counsel, the Board's General Counsel, in refusing to issue a complaint, affirmed that the Act accords a union no right to be present during an employer-employee meeting which precedes discipline and involves no adjustment of a grievance. Case No. 289, 29 L.R.R.M. 1454 (March 28, 1952); Case No. K-71, 37 L.R.R.M. 1076 (October 10, 1955); Case No. SR-2382, 52 L.R.R.M. 1181 (December 7, 1962); Case No. SR-2245, 52 L.R.R.M. 1083 (October 29, 1962).

(3) *Before, during and after the hearing and Trial Examiner's Decision in the instant case, the Board's consistent and long-standing view of the law would require dismissal of the complaint herein.* In *Dobbs Houses, Inc.,* 145 NLRB 1565 (1964), an employee was called in for an interview by her employer concerning reported misconduct. Her request that a union representative be present was denied, and at the conclusion of the interview, she was discharged. In dismissing the complaint, and finding the company had not violated Section 8(a)(1) of the

Act, the Board adopted the following finding of the trial examiner (145 NLRB at p. 1571):

> "I fail to perceive anything in the Act which obliges an employer to permit the presence of a representative of the bargaining agent in every situation where an employer is compelled to admonish or to otherwise take disciplinary action against an employee, particularly in those situations where the employee's conduct is unrelated to any legitimate union or concerted activity . . . "

Again, in *Elec. Motors & Specialties, Inc.*, 149 NLRB 1432 (1964), the Board concluded that an employee who had been called in for a disciplinary interview (149 NLRB at p. 1440):

> " . . . had not been called in connection with a pending grievance; (hence) her statutory and contract right to representation was inapplicable. The employee's right to representation *when she presents a grievance* is not violated when the employer calls her in for admonition or discipline." (Original emphasis.)

But in 1967, the Board decided *Texaco, Inc., Houston Producing Division*, 168 NLRB 361, the case relied upon by General Counsel in prosecuting the instant case. There, an employee was seen stealing company products by his supervisor. He was suspended almost immediately. Later, an investigatory interview was scheduled for the employee; and he requested that a union representative be permitted to attend. The company denied his resuest and advised him he need not continue with the interview. The employee chose to proceed, admitted the theft and received additional discipline. The Trial Examiner found no violation of Section 8(a)(5) of the

Act in that no grievance had yet arisen and, hence, the employee interview did not involve adjustment of a grievance. The Trial Examiner further concluded there had been no violation of Section 8(a)(1) of the Act because the employee could have filed a formal grievance and thereby assured himself of union representation. The Board reversed: finding that the company knew all the facts prior to the employee interview; that the interview was not investigatory in nature but more concerned with substantiating is case against the employee; that, by such interview, the company had unlawfully sought to deal directly with the employee on a matter affecting his terms and conditions of employment; and that, by denying the employee's request for representation, the company had violated Section 8(a)(1) of the Act.

Ten days after *Texaco-Houston,* above, the Board decided *Chevron Oil Company,* 168 NLRB 574 (1967), in which it held that exclusion of union representation from an employer-employee interview was not unlawful. There, a foreman had reported nine employees for leaving the job early. Investigatory interviews were scheduled and held. Employee requests for union representation at such interviews were denied. After the interviews, the company disciplined seven of the employees and exonerated two. The Board concluded that such a fact-finding meeting was merely an added effort on the employer's part to hear both sides of the story before reaching a decision, and pointed out that employees should not be shielded by a bargaining agent from company inquiries when management embarks upon an investigation to ascertain whether plant discipline has been breached. Likewise, in *Jacobe-Pearson Ford, Inc.,*

172 NLRB No. 84 (1968), the Board upheld the employer's denial of requested union representation at a proposed meeting between an employer and his procrastinating employee, finding that the meeting was called merely for the purpose of gathering information, even though the employer's pre-meeting conduct may have looked ominous to the employee.

In the meantime the United States Court of Appeals of the Fifth Circuit was reviewing the Board's decision in *Texaco, Inc., Houston Producing Division, supra,* and in 1969 denied enforcement of the Board's order therein, *Texaco, Inc., Houston Producing Division* v. *N.L.R.B.*, 408 F. 2d 142 (5 Cir. 1969), stating (408 F. 2d at p. 144, footnotes omitted):

> "After a careful study of the record, we can find neither basis in fact nor in law for the Board's conclusion that a union representative should have been permitted to be present during the interview. The evidence is overwhelming that the interview was investigatory in nature and there is absolutely no evidence that the comptroller sought to deal with Alaniz about the *consequences* of his alleged misconduct. The function of the interview was to question Alaniz, not to bargain with him.
>
> "The Board has properly recognized that an employee's right to union representation does not apply to all dealings with his employer which may eventually or ultimately affect the terms and conditions of his employment." (Original emphasis.)

Then, after citing and discussing the Board's intervening decisions in *Jacobe-Pearson* and *Chevron Oil,* above, the Court continued (408 F. 2d at p. 145):

> "The result reached in these two cases would appear equally appropriate in the case *sub judice*. The Board's reason for finding otherwise is not entirely clear. It attempts to explain away the inconsistency by pointing out that in neither *Chevron* nor *Jacobe-Ford* had the employer committed himself to disciplinary action at the time of the interview. But as the Company urges in its brief and as it clearly appears from the record, the Company was not committed to disciplinary action. The foreman's suspension of Alaniz was conditional pending the outcome of an investigation and by no means *committed* the Company to a course of action. In any event, if an *interview is truly investigatory*, we see no reason why an employer's prior commitment to disciplinary action should necessarily transform it into a *collective bargaining session* requiring union representation." (Original emphasis.)

In the instant case, the attempted employee interview was investigatory in nature and Quality was not committed to discipline.

After the decision of the Fifth Circuit in *Texaco-Houston*, the Board decided three other cases involving similar denials of union representation. *Wald Manufacturing Company*, 176 NLRB No. 119 (1969); *Dayton Typographic Service, Inc.*, 176 NLRB No. 48 (1969); and *Texaco, Inc., Los Angeles Sales Terminal*, 179 NLRB 976 (1969). In all three cases, the Board dismissed complaints which included, as here, allegations that such denial of union representation violated Section 8(a)(1). The principle adopted by the Board in *Dayton Typographic* appears to represent its continuing sentiment throughout these cases. Thus, (*Dayton Typographic Service, Inc.*, 176 NLRB No. 48 at p. 9 of the Trial Examiner's Decision adopted by the Board):

"It is only where an employee is called into a discussion with management on a problem involving his performance, which has gone beyond the fact-finding or investigation state to a point where management has decided that discipline of that specific employee is appropriate, that the employer is required on demand of either the employee or his bargaining agent to permit that agent to be present."

In *Illinois Bell Telephone Company*, 192 NLRB No. 138, decided in August, 1971, a phone repairman was suspected of pilfering from a pay phone. He was interrogated; was told the money had been marked; and was made to put the money from his pockets under a flouresecent light. Thereafter, he was interrogated again and his request for union representation was denied. Still later, he was told the money had been marked; and that the interrogator thought he, the employee, had that money. Then, the employee's money was again flouroscoped and he was told that his money was marked. The employee was then asked to sign a statement and the employee again asked for and was denied union representation. Later that day, the employee was suspended. The Trial Examiner's conclusion in *Illinois Bell Telephone* adopted by the Board, was that at the time of these interrogations no discipline had been decided upon; that the interrogation was fact-finding in nature; and that neither Section 8(a)(1) or (5) of the Act had been violated because "the case law seems clear that the Act exacts no obligation upon the Company to accord the employee the right to union representation at that level of discussion." *Illinois Bell Telephone Company*, 192 NLRB No. 138, at p. 5 of Trial Examiner's Decision.

Such was the state of the law as seen and consistently applied by the Board and Courts at the time of the Quality decision.

(4) *The Board decisions in Quality Manufacturing and Mobil Oil erase twenty-five years of case law under the guise of passing upon new issues.* In the case at bar, decided January 28, 1972, only five months after *Illinois Bell Telephone Company, supra,* an employee shut down her machine, and caused other employees to cease work. A supervisor told her to resume work and the employee challanged the supervisor's authority. The employee was then asked to report to the supervisor's office. She did, but brought along an employee-union representative who left her own machine without permission. The supervisor refused to talk to the employee other than in private. The employee declined to do so and both the employee and her union representative were told to return to work. On the next working day the union representative was suspended and the employee was again called into the supervisor's office. This time she brought along a different employee-union representative who accompanied the employee without receiving permission to not punch in for work. Again the employer refused to talk to the employee except in private and again the employee declined. After a repeat of these sequences, the Company discharged, among others, the employee for, as the Board found, insubordination for refusing to talk to management without union representation. In examining these facts the Board then twice engaged in pretense. The Board recited that the presence of a disciplinary discharge presented a distinguishing issue from prior cases; and further, that prior cases

involved only a refusal to bargain in violation of Section 8(a)(5) of the Act and not a violation of Section 8(a)(1) and the Section 7 rights of individual employees to act in concert for mutual aid and protection. The Board then blithely concluded that *Quality Manufacturing* presented an issue not heretofore directly passed on (195 NLRB No. 42 at pp. 6-7). None of this is true. *Ross Gear, supra,* decided by the Court, involved a similar discharge and a consideration of Section 7 rights. And in *Texaco, Inc., Houston Producing Division,* above, 168 NLRB at p. 362, the Board found that the employee's discipline was "tainted" by the company's denial of union representation and ordered him to be made whole. And, of course, all management orders to employees — including those considered by the Board in prior cases wherein employees were directed by supervision to cooperate in a private investigatory interview — carry with them the implicit threat of discipline. Further, in all the prior cases involving these investigatory interviews, a violation of Section 8(a)(1) was in fact alleged and passed upon by the Board. Indeed, such issue was specifically argued by the Board to this Court in *Ross Gear, supra,* 158 F. 2d at p. 611.

Thus, the Board in *Quality,* dismissed the product of twenty-five years of closely reasoned decisional law without any fresh insight on the workings of Section 8(a)(1) or Section 7 from the Congress. The sum and substance of the Board's substitute legal rationale is, "After reflection, we have concluded that it is a serious violation of an employee's individual right to be represented by his union if he can

only request or insist on such representation under penalty of disciplinary action." (195 NLRB No. 42, at p. 7). The Board cited no supportive legal authorities or legislative history. Nor did it engage in any analysis of the statutory provisions. Rather, it suggested as a "proper" course that such interviews be made voluntary so that the employee could refuse to participate if he has reasonable ground to fear that the interview would adversely affect his continued employment. It would appear that the Board again needs reminding that the Congress has not invested it with powers of a social arbiter or to rearrange union-employer relations into what the Board may prefer; but, rather, to determine whether the Act has been violated. And in the entire history of the law as developed above, the managemnt prerogative of conducting an investigatory interview such as Quality attempted herein has not been considered a violation of the Act. The language in the concurring opinion of Justices Stewart, Douglas and Harlan in *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 at pp. 225-26 (1964), is apt:

> " 'It is possible that . . Congress may eventually decide to give organized labor or government a far heavier hand in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy. Whether we should follow it is, within constitutional limitations, for Congress to choose. But it is a path which Congress certainly did not choose when it enacted the Taft-Hartley Act.' "

Similarly, this Court has stated that whether or not an employer is just or unjust, wise or unwise is not a matter for concern for the Board, *N.L.R.B.* v. *Kearney & Trecker Corp.*, 237 F. 2d 416, 419 (7 Cir. 1956); and that the Board should not substitute its judgment for what are basically managerial decisions, *N.L.R.B.* v. *Auto Industries, Inc.*, 313 F. 2d 858, 863 (7 Cir. 1963).

In *Mobil Oil Corporation*, 196 NLRB No. 144, the Board furnishes us with no further legal basis for its conclusion than in *Quality Manufacturing;* to wit, and stripped of its dross, that *it thinks* what Mobil did was a serious violation of the Section 7 rights of employees. A court of appeals has correctly reversed the Board in *Mobil Oil Corporation*, 482 F. 2d 842.

Based upon the foregoing, it is submitted that the Board's order herein must be denied enforcement for two reasons.

First, it is settled law that the Board, as well as any other administrative agency, must disclose the findings and analysis which support its decisional conclusions so as to give clear indication that it has exercised, and not exceeded, the discretion with which the Congress has empowered it. *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 197 (1940); and see *Burlington Truck Lines, Inc.* v. *U.S.*, 371 U.S. 156, 167-168 (1962), and cases cited therein. The Board, it is submitted, has not done so in this case and its order herein must be denied enforcement on this ground alone. The need for the Board to furnish the courts with a detailed and reasoned analysis showing the relation of a respondent's alleged factual offense with the workings and rationale of the Act is particularly

important where, as here, the Board bases its decision on a novel theory of law which would cast aside some twenty-five years of case law by itself and the courts. And even more specifically, the need for such explication by the Board is further underscored by facts which tend to foster a natural skepticism of the *ex-officio* expertise of the Board majority below composed of Messrs. Miller, Fanning and Jenkins. The facts are that all three of these Board Members have joined in the dismissal of complaints on a legal theory which, on the basis of the Trial Examiner's undisturbed findings of fact, would have exonerated Quality's conduct herein; *i.e.*, the Board theory in vogue at the time of the hearing herein which was that an employee was not entitled to union representation at an investigatory interview if at the time, the employer was not committed o discipline. Thus, in *Chevron Oil,* Member Jenkins did so; in *Jacobe-Pearson Ford* it was Member Fanning; in *Wald Manufacturing* and *Texaco-Los Angeles* it was Members Fanning and Jenkins; and in *Illinois Bell Telephone,* decided after the hearing herein, it was Chairman Miller and Member Jenkins. Patently, these gentlemen have changed their minds. But they have failed to give any explanation meaningful in law as to why. This failure, it is submitted, precludes enforcement of their order.

Second, as developed above in the review and analysis of the twenty-five years of Board and court decisions prior to the novel theory of law upon which the Board rests its order herein, it is submitted that the rule of this Court in *Ross Gear, supra,* is correct and requires a conclusion that Quality did not violate Section 8(a)(1) of the Act.

B. THE FACTUAL BASIS OF THE BOARD'S FINDING THAT KING HAD REASONABLE GROUNDS TO FEAR DISCIPLINE IS SUBJECTIVE, ARBITRARY, DEFICIENT IN RATIONALE, AND MAKES FOR BIZARRE PROCEDURAL PROBLEMS.

In the case below Quality was charged with a violation of the Act for refusing the demand of King that she be accompanied by another employee during an interview by management. The Board found that King had personally requested representation, and that she had reasonable ground to fear that the interview could adversely affect her employment status. The Board completely fails to explicate its rationale. It did not explain why the personal request by King converted Quality's investigatory motivation into a violation of Section 8(a)(1). Is it that under the Board's new theory of law an employee can waive her rights under Section 8(a)(1)? The Board does not say. Is it that the employee's personal request for representation is regarded by the Board as the one requisite objective fact which shows her reasonable grounds to fear discipline? The Board does not say. Assuming that the Board would not restrict the protection of Section 8 (a)(1) only to employees who are vocally aggressive or knowledgable about their alleged rights under Section 8(a)(1), the Board must be saying that the employee herself, not anyone else, must have reasonable grounds to believe that the interview may result in her discipline; and, further, that her personal request for representation is the one distinguishing and essential objective fact which must be presented

to show she had reasonable grounds to fear discipline. And, of course, this reliance by the Board on an employee's personal request for union representation to show her reasonable ground for belief finds its root, as charged by the dissenting Board member, in the subjective state of mind of the employee making the personal request for representation. But the Board has consistently refused to receive, inquire into, or receive as evidence, the subjective state of mind of employees to determine whether the Act had been violated. *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), *enforced* 351 F. 2d 917 (6 Cir. 1965); *Levi Strauss*, 172 NLRB No. 57 (1968); and see *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575 (1969) in which the Court stated (at p. 608):

> "We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry."

Further, as Chairman Miller of the Board recently stated in *Congoleum Industries, Inc.*, 197 NLRB No. 52 (1972) at p. 3 (Slip Op.):

> " . . . the decision herein should not turn on the subjective motivations of the employees. I would not attempt to probe the psyches of employees to determine whether it is fear, protest or other subjective intent which motivates their concerted activity."

On the basis of the foregoing, it is submitted that Board's order herein must be denied enforcement on a number of separate and additional grounds.

First, it has again failed to explicate and relate the significance of its factual findings to either the

language or intent of Section 8(a)(1) of the Act. This, and the Board's further failure to explain, or even consider, relevant facts and their relationship to each other and Section 7 of the Act again demonstrates that the Board has violated the rule of *Phelps Dodge, supra,* and like cases which mandate the Board to set forth sufficient findings and analysis to allow reviewing courts to determine whether the Board has acted within the discretion invested in it by the Congress.

Second, given the Board's new theory based upon the personal belief of the employee herself and the Board's failure to explain evidence relevant to such beliefs, it becomes evident that the Board's novel theory of law is not supported by objective substantial evidence; and further, that its finding that employee King had reasonable ground to fear that the interview might result in her discipline rests upon an attempted divination, unsupportable in fact or law, of the subjective state of mind of this employee.

Moreover, if the Board should choose to press its novel theory of the law in future cases the result could be procedurally bizarre. Thus, it appears patent that an employee's guilt or innocence of theft would be a prime objective fact in determining his apprehension over the investigatory interview. Guilt or innocence of the employee involved was not litigated in the hearing herein for the reason that it was irrelevant to General Counsel's theory of the case or Quality's defense thereto. However, for future cases it is well to consider that in Board proceedings the Board's General Counsel has the burden of proof. Will the General Counsel be required to show the

employee's guilt or guilty knowledge by a preponderance of the evidence? Will the testimony of, or the filing of an unfair labor practice charge by, an employee constitute a waiver of his Fifth Amendment rights? The possibilities are endless and incompatible with proceedings under a remedial, not a criminal statute.

It is suggested when the Board, with scant justification beyond "after reflection" kicks over twenty-five years of case law and, as developed below, the intent of Congress, only administrative confusion can be expected.

C. ENFORCEMENT OF THE BOARD'S ORDER WOULD DEROGATE ELEMENTAL CONCEPTS OF PROCEDURAL DUE PROCESS, BECAUSE SAID ORDER IS BASED ON A FINDING WHICH WAS NEITHER ALLEGED NOR FULLY LITIGATED AT THE HEARING BELOW

As noted above, the instant case was prosecuted by the General Counsel on the basis of *Texaco, Inc., Houston Producing Division, supra,* and cases following. Under that line of authority, the salient factors giving rise to an employee's right to representation are whether the interview was investigatory or disciplinary in nature; *i.e.,* whether or not the employer had decided upon discipline prior to conducting the interview.

At no time in the proceedings prior to the Board's decision in this case was Quality put on notice that

the theory of liability or violation would be other than that espoused in such line of authority.

Thus, the complaint in the instant case made no mention of the employee's alleged state of mind, or the existence of "reasonable grounds to fear" discipline at the time of the interview. Quality was thus not put on notice by the Complaint that the employee's pre-interview state of mind would be an issue — much less the issue — in the instant case. Counsel for the General Counsel tried this case on the theory that reflected the Board's then current view of the law; namely, that the interviews conducted by Quality were not investigatory; but rather, were for the purpose of obtaining disciplinary action. No indication whatever was given by the General Counsel at any time prior to or during the proceedings that the employee's state of mind, or fear of the purpose of the interviews, would be in any way a relevant issue. Thus, the Board's new and different theory of law would, of course, have demanded and elicited an entirely different set of proof.

Clearly then, it was thus not until well after the hearing, when the Board announced its brand new theory of liability, that Quality was made aware of the purported relevance of the "state of mind" issue.

Under the above circumstances, if for no other reason, this Court cannot grant enforcement to the Board's Order without doing violence to the most elemental concepts of procedural due process. *Russell-Newman Mfg. Co.* v. *N.L.R.B.*, 370 F. 2d 980, 984 (5 Cir. 1967). As was stated in *N.L.R.B.* v. *Cone Mills Corp.*, 373 F. 2d 595, 600 (4 Cir. 1967):

"If the Board's order is to be enforced, it must be on the theory of the complaint . . . "

In *N.L.R.B.* v. *H. E. Fletcher Co.*, 298 F. 2d 594, 600 (1 Cir. 1962), the Complaint had alleged violation of Section 8(a)(5) based on the purported failure of the Company to bargain in good faith with the union over wage increases. After the hearing, the Board also found a violation of 8(a)(5) based on the Company withdrawal of recognition from the union following a bargaining impasse. The Court refused to enforce this latter finding, based on the fact that the issue had not been mentioned in the complaint or litigated in the hearing. As the Court stated (298 F. 2d at 600):

"(T)he complaint is totally devoid of any allegation which would put (the respondent) on notice that the reasonableness of the post-settlement time interval was challenged. Consequently respondent presumably had every legitimate reason to believe that the question of whether or not a reasonable time had elapsed was not one of the issues in the case. The belief was undoubtedly confirmed by the opening statement of counsel for the General Counsel who stated at the hearing" 'The issue which is before you today is rather narrow and confined to whether or not the Company bargained in good faith with the charging Union with regard to the issue of wages.'

* * *

". . . and, thereafter, at no time during the course of the hearing was there any contention made that respondent's refusal to recognize the Union beyond February 10, 1960, constituted a violation of Section 8(a)(5) and (1). In sum, the Board made a finding of a violation which was

neither charged in the complaint nor litigated at the hearing.

> "We believe that it would derogate elemental concepts of procedural due process to grant enforcement to such a finding."

The issue is whether the respondent was fairly apprised, by the complaint or otherwise, of the significance of evidence of the employee's state of mind to the legal claim involved and thus afforded a reasonable opportunity to meet such evidence, and frame its own case accordingly. Evidence, of course, is not introduced blindly or haphazardly; but to meet the recognized legal elements which, taken together, constitute a violation of the law or a successful defense. Quality was afforded no such opportunity to defend in the instant case.

Accordingly, it is submitted that, the issue of "reasonable grounds to fear" discipline cannot be said to have been fairly litigated in this case. In *J. C. Penney Co., Inc.* v. *N.L.R.B.*, 384 F. 2d 479 (10 Cir. 1967), the Board found an independent Section 8(a)(1) violation based upon a supervisor's statement to an employee. This issue was not pleaded in the complaint. The Court noted that, even where an issue is not so pleaded, if it is "fairly tried" by the parties at the hearing, a finding of a violation may be proper. "But even so," said the Court, "we do not think this particular issue was ever injected into the lawsuit at the examiner's level." In *J. C. Penney,* the evidence of the supervisor's statement was an affidavit introduced over Respondent's objection at the hearing. The Respondent objected to the relevance of the document; the Trial Examiner voiced

his mystification as to its relevance; and the General Counsel explained it was introduced by way of background. The affidavit was accepted in evidence, but, as the Court noted, "nothing more was said concerning the violative nature of (the supervisor's) statement contained therein." (Id. at 483). The Court went on (Id. at 483):

> "From these facts we think it is clear the Board made a finding which was neither charged in the complaint nor litigated at the hearing. By Regional Counsel's own statement, it is manifest that the employer was never put on notice that (the supervisor's) purported statement standing alone was in issue, and that (the employee's) testimony and affidavit were introduced for the sole purpose of corroborating other evidence regarding the purpose of the wage increases (which wage increases were alleged in the Complaint as violative).
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> * * *
>
> "Failure to clearly define the issues and advise an employer charged with a violation of the law of the specific complaint he must meet and provide a full hearing upon the issue presented is, of course, to deny procedural due process of law. NLRB v. Bradley Washfountain Co., 192 F. 2d 144 (7th Cir. 1951)."

In the instant case, as in *J. C. Penney*, Quality was not aware that a new issue had been injected into the hearing. In fact, this new issue became "relevant" only after the hearing had been closed for months. Clearly then, the issue of "reasonable ground to fear" discipline was never fully litigated at the hearing herein, and the Board's finding on this issue to support its decision that the Act was violated is in clear violation of minimum standards of procedural

due process, to Quality's obvious prejudice. For this reason alone, even if the Board's novel theory is accepted by this Court, the Board's order herein should be denied enforcement.

D. THE BOARD HAS EXCEEDED THE INTENT OF CONGRESS RELATIVE TO UNION REPRESENTATION AT EMPLOYER-EMPLOYEE MEETINGS; HAS INVADED THE AREA OF DISPUTE SETTLING PROCEDURES WHICH CONGRESS SPECIFICALLY LEFT TO THE PARTIES TO A BARGAINING CONTRACT:

Congress did not overlook or remain silent on the problem of union representation at employer-employee meetings. In Section 9(a) of the Act it gave employees the right to present grievances to their employer without intervention of their bargaining representative; provided that the bargaining agent be allowed to be present at the adjustment of any grievance to see that such adjustment is not inconsistent with the bargaining contract in effect. Clearly, the Congress in considering the area of union representation at employer-employee meetings, extended no specific statutory right to either employee or union that a representative be permitted to intervene in such meetings prior to a grievance being filed. And that the Congress did not impliedly extend such right of representation is attested to by the twenty-five years of case law on this problem, as presented and analyzed in Part A of this Argument. To the contrary, it is submitted that Congress intended representation disputes of the kind herein brought before this Court to be resolved in the dis-

pute settling procedures worked out by the union and employer parties to bargaining contracts.

Thus, also in 1947, the Congress enacted Section 203(d) of the Act which reads, in pertinent part, as follows:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. * * *"

And in 1957, the Supreme Court brought life to Section 203(d) and Section 301 of the Act, 29 U.S.C. §185 by holding that Section 301 not only gave federal courts jurisdiction over suits involving collective bargaining agreements but also authorized "federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements . . . " *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 451 (1957). In the host of lawsuits on the arbitration provisions in bargaining contracts which followed *Lincoln Mills,* the Supreme Court has repeatedly emphasized that the congressional policy embodied in Section 203(d) is to be strictly observed by the courts. Thus, in *United Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564 (1960), the Court referring to this congressional policy, stated (at p. 566):

> "That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play."

Moreover, on the scope of an arbitration clause the Supreme Court made it clear that all doubts should be resolved in favor of submitting a dispute to aribtration; stating that an order to arbitrate should not be refused "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-83 (1960).

In its Decision and Order below, the Board neither mentions or considers any of the facts in the preceding paragraph. Yet in a decision made public on August 6, 1972; *Western Electric Company,* 198 NLRB No. 82; it would appear that Chairman Miller of the Board now considers such evidence as being crucial to the issue before this Court. In *Western Electric,* the company was charged with a violation of Section 8(a)(1) for denying employees union representation when they were interviewed by the company in the course of an investigation into employee misconduct. The Board panel was composed of Members Kennedy and Penello, and Chairman Miller. Members Kennedy and Penello dismissed the complaint on the grounds spelled out by Member Kennedy in his dissent in the instant case. Chairman Miller, who was part of the majority panel in the instant case, joined them in dismissing, but on different grounds. Mr. Miller noted that although the bargaining contract between the parties spelled out the various steps and participants in the contract's grievance procedure the parties had been unable to agree on whether the contract provided for union representation at investigatory interviews and had

twice submitted the issue to arbitration with results unfavorable to the union. Chairman Miller stated:

> "There remains only the question of whether an agreement which expressly, or through interpretation, operates to exclude union representation in investigatory interviews, is repugnant to the statute. Since, as indicated by the discussion, *supra,* we have regularly permitted parties, by agreement, to determine how representation rights shall be channeled during the life of a collective agreement, there would seem to be no basis for reaching a contrary result here. If the parties desire to change these channels in future negotiations, they are free to do so. Thus, if the employees should become convinced that representation in the course of these interviews is necessary as a part of their total protection from what they may view as a harsh or unfair application of the employer's disciplinary policies, they are free to seek this additional safeguard, and to refuse to authorize their agent to make an agreement which does not include such safeguards."

Chairman Miller mentioned none of those considerations in deciding the instant case. Yet the factors which were present in *Western Electric* were also present in the instant case.

In the instant case, the employee involved was covered by a collective bargaining agreement under which all grievances were subject to final and binding arbitration. And under this bargaining agreement a grievance was broadly defined. In the instant case, the Union filed a grievance but later abandoned it.

The only factor distinguishing *Western Electric* from the instant case, and we have no views from

Chairman Miller on its importance, is that in *Western Electric* the question of union representation at investigatory interviews has been arbitrated whereas in the instant case it could have been arbitrated. And this, it is submitted, is a distinction without a difference. The decisive factor, under the teachings of the Supreme Court, is whether a grievance is arbitrable and not whether a similar grievance has been arbitrated. Otherwise, no new issue would ever reach arbitration. As the Supreme Court stated in *United Steelworkers of America* v. *American Manufacturing Company,* 363 U.S. 564, 567-568 (1960):

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for."

The mandate of Section 203(d) is flexibility for the contracting parties to work out their own dispute settling procedures. Quality and the Union have done so herein. For the Board to impose a rigid requirement as to when, how, or by whom union representation should take place is in complete derogation of this congressional intent. And, of course, the issue of union representation here before this Court is not a novel one for arbitrators to decide. To the contrary, it is grist for the arbitral mill. See, e.g.,

United Air Lines, Inc., 28 LA 179 (1956); *E. I. duPont de Nemours & Co.*, 29 LA 646 (1957); *Erwin Mills, Inc.*, 43 LA 31 (1963).

Moreover, Chairman Miller, in his concurring opinion in *Western Electric, supra,* can only be taken as finally conceding that the precise aspect of union representation before this Court is a proper subject for bargaining. This being the case, it is submitted that the Board decision herein would require Quality to accede to the Union's demand for a bargainable condition of employment and, hence, is in contravention of the Supreme Court's mandate in *H. K. Porter Corporation, Inc.*, v. *N.L.R.B.*, 397 U.S. 99 (1970) that neither a union nor an employer may be compelled to agree to a proposal or the making of a concession.

The Court of Appeals in Quality correctly held that King had no right to have a union representative present at the requested meetings with her employer. Thus, Quality did not violate Section 8(a)(1) of the Act. The Court held:

> "And it would appear that the entire history of the law as developed above, the management prerogative of conducting an investigatory interview such as Quality attempted here has not been considered a violation of the Act."

Courts of Appeals have reached similar conclusions in Mobil Oil Corp., 482 F. 2d 842 (C.A.7) and J. Weingarten, Inc., 485 F. 2d 1135 (C.A.5).

CONCLUSION

For all of the foregoing reasons, and each of them, the petition for enforcement of the Board's Order should be denied and the Court of Appeals order affirmed.

Respectfully submitted,

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